COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NUMBER: 2014-SC-000243-DG

(On Appeal from Ky. Court of Appeals, Case No. 2012-CA-001172)

JOHN C. MARTIN *APPELLANT*

VS.

Appeal from Anderson Circuit Court
Hon. Charles R. Hickman, Judge
Case No: 09-CR-00042

COMMONWEALTH OF KENTUCKY *APPELLEE*

BRIEF FOR APPELLANT

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2015, the foregoing "Brief for Appellant" was served by first-class mail upon Hon. Charles R. Hickman, Vice-Chief Regional Circuit Judge, Chief Circuit Judge, 401 Main Street, Suite 401, Shelbyville, KY 40065-1133; Hon. Laura Donnell, 544 Main Street, Shelbyville, KY 40065; Hon. Christian K. R. Miller, Assistant Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601; and Mr. John C. Martin, #244453, Kentucky State Reformatory, 3001 W. Hwy 146, LaGrange, KY 40032. I also certify that the record has been returned to the Supreme Court of Kentucky this same day.

COUNSEL FOR APPELLANT

INTRODUCTION

This is an appeal from the Kentucky Court of Appeals' Opinion of Martin, et al. v. Commonwealth, which determined that the Appellant's *pro se* Motion to Amend Sentence should be treated as an RCr 11.42 Motion.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests oral argument in this case, as he believes such argument would be beneficial to understanding the basis for reversing the Court of Appeals' opinion and the remedies that he seeks.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

In this Commonwealth, upon a final conviction, defendants have but one opportunity to right any error underlying their conviction or forever carry with them the stigma and consequences of their convictions. *See* RCr 11.42(3). John was convicted in Anderson County of several sex offenses relating to his ex-wife's daughter and sentenced to serve a 23-year sentence.[1]

Prior to pleading guilty, John's case lingered from August 2009 through January 2011. During this time period, John never understood the charges or the details of the allegations he faced. (VR CD: 4/19/11; 11:06:40-11:09:00). This is evidenced by the conversation that occurred on the record with the court after he pled guilty. (Id.). Once John learned of the allegations underlying the indictment, he moved to withdraw his guilty plea, which the court denied, and John was sentenced that same day. (VR CD: 4/19/11; *passim*).

Desperate to challenge the allegations he unwittingly affirmed the day he pled guilty, John immediately began preparing to challenge his conviction. While preparing to file his RCr 11.42 Motion, he was approached by a "jailhouse lawyer" who convinced him to sign his name to a form motion to challenge the constitutionality of the sex offender conditional discharge sentence; no procedural rule or statute was cited in the motion for invoking the court's jurisdiction. (TR: Vol. II; 244-45).

The *pro se* form motion was filed on May 4, 2012, entitled Motion to Amend Sentence. (TR: Vol. II; 239-42, 244-45). The argument set forth was that KRS §532.043, which required sex offenders to serve conditional discharge, was unconstitutional, and

[1] The length of John's sentence is but one of the patently unlawful aspects of his conviction which he has raised in his currently abated RCr 11.42 Motion pending before the circuit court.

therefore, his sentence was required to be amended. "[A]ny enhancement to the statutory length of a sentence, as this Conditional Discharge, must be presented in an indictment, tried by a jury, a d [sic] the enhancement must be levied by the jury after finding guilt beyond a reasonable doubt." As authority for this argument, the motion cited U.S. Constitutional Amendments V, VI, and XIV, Apprendi v. New Jersey, 530 U.S. 466 (2000), Jones v. United States, 526 U.S. 227 (1999), Bailey v. Commonwealth, 70 S.W.3d 414 (2002), and Ladriere v. Commonwealth, 329 S.W.3d 278 (2010). (Id.). Without citing any rule or statute for reviewing and deciding this motion, the circuit court determined that John had been sentenced in accordance with the sentencing statutes and denied his Motion in an Order entered June 18, 2012. (TR: Vol. II; 248-49 (attached hereto as Appendix 1)). It is from that Order that John appealed to the Court of Appeals in Case No. 2012-CA-001172. (TR: Vol. II; 254-59).

The Department of Public Advocacy (DPA) was appointed to represent John on appeal, and upon review of John's Motion, DPA moved to withdraw as counsel, noting that John was not entitled to post-conviction representation pursuant to KRS §31.110(2)(c), stating "a reasonable person with adequate means would [not] be willing to bring at his or her own expense." Despite this assertion by DPA, the Court of Appeals denied the motion.

On appeal, John presented three claims of error: 1) denial of due process when his guilty plea was not knowing, voluntary and intelligent; 2) ex post facto violation in sentencing him to serve a five-year conditional discharge in regard to five of his charges which were alleged to have occurred prior to the statutory amendment enhancing the time period; 3) denial of due process when he was sentenced pursuant to the amended version

of KRS §532.043. (COA Brief for Appellant, p. 3, 5, 7). The Commonwealth responded by stating that claims 1) and 2) had not been presented to the circuit court for review and that there was no denial of due process as to claim 3. (COA Brief for Commonwealth, p. 6, 8, 10). Further, the Commonwealth suggested that John's motion was an RCr 11.42 Motion because it requested to vacate a portion of the sentence. (Id. at p. 1). In his Reply Brief, John contended that the motions, if they are to be construed as a specific type of motion, should be construed as CR 60.02 Motions. (COA Reply Brief for Appellant, p. 1).

In an opinion rendered on April 4, 2014, the Court of Appeals determined that John's motion would be construed as an RCr 11.42 Motion because the title of the motions requested amendment of their sentences, and Gross v. Commonwealth, 648 S.W.2d 852 (Ky. 1983) requires RCr 11.42 Motions be filed prior to CR 60.02 Motions. Martin, et al. v. Commonwealth, slip opinion, p. 3-4 (attached hereto as Appendix 2). The Court of Appeals then concluded, in regard to John's claims, that claim 1) was not properly raised before the circuit court; claim 2) was not an *ex post facto* violation; and claim 3) did not result in a denial of due process. Id.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN DETERMINING JOHN'S PRO SE MOTION WAS AN RCr 11.42 MOTION.

This claim was preserved by John's Reply Brief for Appellant, the Court of Appeals' Opinion affirming, and John's Motion for Discretionary Review. Martin, slip op. at 2-3. Whether the Court of Appeals was authorized to recharacterize John's motion, and if so, whether that characterization was appropriate, are questions of law and thus, *de*

novo review by this Court is applicable to this claim. Davis v. Fischer Single Family Homes, Ltd., 231 S.W.3d 767, 779 (Ky. App. 2007).

A. The Court of Appeals Lacked Jurisdiction to Consider the Character of John's Pleading, as it Was Not Presented for Consideration to the Circuit Court and Preserved for Review on Appeal.

The question of what type of motion John filed was never raised at the trial court level. Not by John, the Commonwealth, or the circuit court. It is fundamental to the law and the structure of the courts in this Commonwealth that the trial courts are to be given the first opportunity to consider all issues first, and thus, any issues presented for the first time on appeal should be precluded from appellate review. See, e.g., Commonwealth v. Maricle, 15 S.W.3d 376, 379 (Ky. 2000); Swatzell v. Commonwealth, 962 S.W.2d 866, 868 (Ky. 1998); and Commonwealth v. Lavit, 882 S.W.2d 678, 680 (Ky. 1994). Because the lack of a procedural rule or statute in John's motion was never objected to or presented for resolution before the circuit court, the appellate court was without jurisdiction to interpret his *pro se* motion for the first time on appeal. Accordingly, the appellate court's scope of review was limited to the circuit court's resolution of the merits of the claim raised in the motion.

There are several reasons for this rule. First, the rule provides deference to the circuit court, giving the court every opportunity to resolve the case without an appeal. See Henderson v. Commonwealth, 438 S.W.3d 335 (Ky. 2014). Second, the rule achieves judicial economy by requiring all issues presented once and for all and reducing the possibility of multiple appeals and remands. See Johnson v. Commonwealth, 450 S.W.3d 707, 712-13 (Ky. 2014). This Court has noted the importance of providing the trial court with the first opportunity to review error.

> Fundamental to the concept of preservation of trial error in any context is that the trial judge was explicitly made aware of the action desired by the party. By definition, an assignment of error cannot be regarded as "preserved" if its significance was never brought to the trial judge's attention.

Smith v. Commonwealth, 410 S.W.3d 160, 167 (Ky. 2013). However, most importantly, allowing such a lapse in procedure essentially prevents a party from exercising its constitutional right to appeal as a matter of right from an adverse ruling, because the adverse ruling occurs for the first time on appeal. It is clear that the rule of preservation is applicable here, because no party ever sought a ruling as to the characterization of John's pleading, or asserted it to be a certain type of motion prior to the appeal, and the circuit court never ruled on or addressed the characterization of John's motion.

Because the Court of Appeals lacked jurisdiction to rule on the characterization of the pleading, the appellate court opinion on this issue should be reversed and vacated.

B. Even if the Court of Appeals Properly Reviewed the Characterization of John's Motion on Appeal, it Erred When it Failed to Consider John's Intent, or Provide Notice, Warning and Opportunity to Amend or Withdraw.

The Court of Appeals determined that John's pleading should be characterized as an RCr 11.42 based upon:

1) the type of relief requested in the title of John's motion being consistent with the relief provided pursuant to RCr 11.42; and

2) the absence of a previously-filed RCr 11.42 Motion by John and the holding in Gross, *supra*, that RCr 11.42 motions must precede CR 60.02 Motions.

Martin, slip op. at 3-4. As an initial matter, it should be noted that although the motion was styled as a Motion to Amend, the relief requested in the motion was to have a portion

vacated and removed, not altered or amended. This much was acknowledged by the Commonwealth in its Court of Appeals brief. (Brief for Commonwealth, p. 1).

1. Intent

The analysis employed by the Court of Appeals is far too simplistic and substitutes its judgment for that of the petitioner without concern for or recognition of the petitioner's objection to such a characterization. As noted by this Court, "a plaintiff is the master of his own complaint, and is thus entitled to plead his cause of action among alternative courses of action as he deems best to pursue his litigation objectives." Whitley v. Robertson County, 406 S.W.3d 11, 17 (Ky. 2013) (citing The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913)). Thus, central to any determination of the characterization of a defendant's motion is his/her intent.

As noted *infra* at Argument I.A., the characterization of John's *pro se* motion was not questioned or placed at issue until the Brief for Commonwealth on appeal. Consequently, the record of John's intent is not as well developed as it otherwise would have been had this issue been raised before the circuit court *sua sponte*, or by the Commonwealth. However, John's intent that this *pro se* motion not constitute an RCr 11.42 Motion is evident by reviewing the *pro se* filings that followed the subject motion and his Reply Brief for Appellant filed at the Court of Appeals, which was his first opportunity to respond to the contention that his Motion to Amend Sentence was an RCr 11.42 Motion.

Following John's *pro se* Motion to Amend Sentence, John filed the following *pro se* substantive motions[2]:

1) August 13, 2012 – Motion for Trial Court to Order Trial Counsel Sornberger to Supply Case File for Defendant to File 11.42 Motion;

2) March 4, 2013 – Motion to Correct PSI;

3) May 8, 2013 – Motion to Vacate, Set Aside, or Correct Sentence Pursuant to RCr 11.42; and

Noticeably, just months after filing the Motion to Amend, John was on the record indicating that he was preparing for, and intended to file, an RCr 11.42 Motion. This occurred well before the character of his Motion to Amend was ever put at issue. Further, John ultimately did file an RCr 11.42 Motion in May, 2013, still prior to any party or any court characterizing his Motion to Amend Sentence as an RCr 11.42.[3] Lastly, John specifically told the Court of Appeals that he did not intend his Motion to Amend Sentence to be treated as an RCr 11.42 Motion in his Reply Brief for Appellant, p. 3.

While there is some support for the idea of recharacterizing *pro se* pleadings to avoid unnecessary dismissal, to avoid inappropriately stringent standards, or to create better correspondence between the substance of the pleading and the underlying legal basis, see Castro v. U.S., 540 U.S. 375, 381-82 (2003), that is not what happened here. Instead, the Court of Appeals completely ignored John's intent, provided no benefit to his pleading, and made it very unlikely that he will ever obtain any post-conviction relief. Although a court is free to interpret and characterize any pleading which fails to provide

[2] Simultaneously herewith, Appellant files with this Court a Motion to Take Judicial Notice re: filings of record in this case, but which are not contained in the record on appeal before this Court. Copies of these motions are attached to Motion to Take Judicial Notice.

[3] The Brief for Commonwealth filed in the Court of Appeals, which was the first time John's Motion was characterized as an RCr 11.42 Motion, was filed on August 12, 2013.

a label for itself, such should occur, if at all, before the trial court, where there is a greater opportunity to develop the record and withdraw or amend the pleading.

The Court of Appeals, in characterizing the pleading as an RCr 11.42 Motion, cited Gross for the proposition that an RCr 11.42 Motion must precede any CR 60.02 Motion, indicating the proper procedure of litigation in post-conviction. That proposition, however, does not confer upon the court the power to recharacterize pleadings to conform to the procedure, but requires pleadings to follow that procedure lest they be dismissed for failure to do so. Thus, if the Court of Appeals had properly applied Gross, it would have accepted John's intention that his Motion to Amend Sentence be treated as a CR 60.02 Motion, but could have affirmed the circuit court's conclusion on grounds that it was procedurally improper.

By applying Gross to "correct" John's procedural error, it treated John differently than other litigants simply because he was proceeding *pro se*, and did not cite a rule for the basis of his requested relief. Had a petitioner filed the same motion, but cited CR 60.02 and been represented by counsel, the Court of Appeals would never have been so brazen as to alter the legal basis for the motion. This discrepancy in the treatment of petitioners represented by counsel and those proceeding *pro se* highlights the source of the court's willingness to act—its paternalistic nature. See Castro, 540 U.S. at 386 (Scalia, J., concurring in part and concurring in judgment, joined by Thomas, J.). Our courts operate as an adversarial system based upon the principle that a party knows what is best for oneself and is responsible for advancing his own case to obtain the requested relief. Id. The idea that a court should override a petitioner's choice of law or invoked procedure simply because the petitioner is *pro se* is incongruent with such a system.

However, as Justice Scalia aptly notes in his concurrence in Castro, "if departure from traditional adversarial principles is to be allowed, it should certainly not occur in a situation where there is a risk that the patronized litigant will be harmed rather than assisted by the court's intervention." 540 U.S. at 386. Scalia continued by noting that the court's chief concern in altering or assigning a label to a pleading must be not to harm the litigant more than if the erred pleading were to remain as pled. Id. Scalia illustrates this potential harm in terms of recharacterizing a pleading as a §2255 motion, which is the federal court equivalent of the RCr 11.42 Motion.

> The risk of harming the litigant always exists when the court recharacterizes into a first §2255 motion a claim that is procedurally or substantively deficient in the manner filed. The court essentially substitutes the litigant's ability to bring the same claim (or any other claim), perhaps with stronger evidence. For the later §2255 motion will then be burdened by the limitations on second or successive petitions imposed by the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214. A *pro se* litigant whose non-§2255 motion is dismissed on procedural grounds and one whose recharacterized §2255 claim is denied on the merits both end up as losers in their particular actions, but the loser on procedure is better off because he is not stuck with the consequences of a §2255 motion that he never filed.

Id. at 387. Here, the court offered no justification for its decision to override John's intent; the Court of Appeals denied his due process claim producing ultimately the same outcome as had the court accepted it as a CR 60.02 motion and denied it on procedural grounds. However, as noted by Justice Scalia above, although in both instances John loses, the recharacterization by the Court has grave consequences on John's ability to pursue post-conviction relief. The Court of Appeals' recharacterization will deny John the possibility of obtaining any post-conviction relief through his presently pending RCr

11.42. As noted by Scalia, it is improper for the Court to ignore the litigant's intent and alter the intended character of the pleading if there is nothing to be gained for the litigant by the recharacterization. Id. at 388; see also, Greenlaw v. U.S., 554 U.S. 237, 244 (2008) (noting that deviation from party presentation has generally been based upon the need to protect the rights of *pro se* litigants). Here, there was no benefit to John by this recharacterization, only harm.

2. Notice, Warning, and Opportunity to Amend or Withdraw

In Castro v. U.S., the Supreme Court of the United States adopted a set of limitations on district courts' ability to recharacterize *pro se* post-conviction pleadings. These limitations related to a district court's ability to recharacterize a motion as one made pursuant to §2255, the federal counterpart to Kentucky's RCr 11.42 Motion. Just as RCr 11.42 provides for limits on second or successive motions under the rule, so too does §2255. Thus, the facts in Castro are uniquely analogous to the present case, and consequently, so is the holding.

The Castro Court held that when the district court intends to recharacterize a *pro se* litigant's motion as a first §2255 motion,

> the district court must notify the *pro se* litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any subsequent §2255 motion will be subject to the restrictions on "second or successive" motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the §2255 claims he believes he has. If the court fails to do so, the motion cannot be considered to have become a §2255 motion for purposes of applying to later motions the law's "second or successive" restrictions.

540 U.S. at 383. This concept of notice, warning and opportunity has been adopted by state courts as well.

In People v. Shellstrom, 833 N.E.2d 863 (Ill. 2005), the Supreme Court of Illinois was presented with a nearly identical case as the one presented here, including the underlying claim for relief. Shellstrom pled guilty to one count of home invasion and two counts of sexual assault. Id. at 865. As part of Shellstrom's sentence he was required to serve a three-year term of mandatory supervised release (MSR) upon completion of his sentence term. Id. After his conviction was final, Shellstrom filed, *pro se*, a "Motion to Reduce Sentence, Alternatively, Petition for Writ of Mandamus to Order Strict Compliance with Terms of Guilty Plea." Id. at 866. In the pleading, Shellstrom contended that he was denied due process, and the relief sought by Shellstrom was amendment of the judgment to show that he was not required to serve the MSR term. Id.

Shellstrom's pleading was treated by the circuit court as a postconviction petition pursuant to Illinois' post-conviction relief statute, which is the Kentucky equivalent of the RCr 11.42 Motion, and was summarily dismissed. Shellstrom never appeared before the court, was never given notice of the court's intent, and was never given the opportunity to otherwise respond to the circuit court's ruling or intent to rule. Id. Because of the grave effect this recharacterization could have on a litigant's ability to challenge his conviction, the Illinois Supreme Court adopted the holding in Castro, requiring notice, warning, and an opportunity to withdraw or amend. Shellstrom, 833 N.E.2d at 870. Other state jurisdictions that have had the opportunity to address this unique circumstance and have similarly limited avenues of post-conviction relief have also adopted the holding in Castro. See Dorr v. Clarke, 733 S.E.2d 235 (Va. 2012) (adopting the notice, warning, and

opportunity to amend or withdraw requirements prior to recharacterization by a circuit court, and not barring second or successive claims where the litigant was not provided these safeguards); State v. Smith, 184 P.3d 666, 667 (Wash. App. 2008) (noting the need for notice and opportunity to amend or withdraw before the court takes action in amending a pleading that can have consequences of barring future action by a defendant).

Unlike the federal and state-law counterparts noted above, Kentucky's primary vehicle for post-conviction relief, RCr 11.42, completely bars the consideration of a successive motion. This is a much harsher consequence than is noted in Castro and Shellstrom, as it is not just a reduced likelihood of obtaining relief as the other jurisdictions noted, but instead is a complete denial of any further litigation under that rule. See, e.g., Tipton v. Commonwealth, 398 S.W.2d 493 (Ky. 1966) (prisoner who had previously gained review of motion to vacate judgment had no legal right to make a second attack on the judgment by a similar motion); Hampton v. Kentucky, 454 S.W.2d 367 (Ky. 1970) (where the defendant's motion was merely a successive motion that only stated grounds that had or should have been presented earlier, the overruling of the motion would not be reviewed on appeal); and Butler v. Commonwealth, 473 S.W.2d 108 (Ky. 1971) (defendant is not entitled to relief under RCr 11.42(3), upon his second application for relief, where his complaints should have been made in his first application for relief). Because the consequence of characterizing a *pro se* litigant's motion as being brought pursuant to RCr 11.42 is so severe, this Court must require the safeguards set forth in Castro, and adopted in other state jurisdictions, to prevent the courts from unwittingly denying defendants any possibility of challenging their convictions.

In the case *sub judice*, no recharacterization occurred by the circuit court, thus no notice, warning, or opportunity to amend of withdraw occurred. However, the Court of Appeals did recharacterize John's Motion, and in doing so, failed to give John the opportunity to either amend or withdraw his motion,[4] as is appropriate in light of the bar on successive RCr 11.42 Motions in Kentucky. Thus, the appropriate remedy under these circumstances is to vacate the Court of Appeals' opinion and remand this case to the circuit court for a determination of John's intent in characterizing the filing, notice and warning if the court intends to recharacterize it, and the opportunity to amend or withdraw it consistent with the safeguards announced in Castro.

CONCLUSION

John never intended his *pro se* Motion to Amend Sentence to be treated as an RCr 11.42 Motion. He filings in the circuit prior to any question being raised as to the character of the motion indicate that at no point in time did John ever believe that he had filed an RCr 11.42 Motion, and had he been given the opportunity to withdraw the motion or proceed with it as an RCr 11.42, he would have done the former.

In light of Kentucky's bar on successive post-conviction motions pursuant to RCr 11.42, the courts should have adopted the Castro safeguards and permitted John the opportunity to withdraw or amend his motion. The Court of Appeals erred in ignoring his intent and recharacterizing his motion in a manner that did not serve to protect any of John's rights, but only serves to bring him harm. John requests this Court vacate the

[4] Although, John could not have withdrawn his motion while the case was before the Court of Appeals, the appellate court could have remanded the case to the circuit court to provide him such an opportunity.

Court of Appeals' opinion and remand the case to the circuit court for proceedings consistent with Castro and for all other relief that this Court deems appropriate.

Respectfully submitted,

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